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FIRST GENERAL COUNSEL'S REPORT

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DATE COMPLAINT FILED: April 9, 2012

DATE OF NOTIFICATION: April 11, 2012

LAST RESPONSE RECEIVED: June 5, 2012

DATE ACTIVATED: July 17, 2012

EXPIRATION OF SOL: March 24, 2017 -
April 3, 2017

COMPLAINANT:

Mark R. Brown, Newton D. Baker/Baker and
Hostetler Chair of Law, Capital University Law
School, and Ohio registered voter

RESPONDENTS:

Ohio State Medical Association
U.S. Senator Sherrod Brown
Friends of Sherrod Brown and Judith Zamore in her
official capacity as treasurer
Josh Mandel, Republican Party candidate for Ohio's
2012 U.S. Senate seat
Citizens for Josh Mandel, Inc. and Kathryn Kessler
in her official capacity as treasurer

RELEVANT STATUTES AND
REGULATIONS:

2 U.S.C. § 441b(a)-(b)
11 C.F.R. § 100.26
11 C.F.R. § 109.21
11 C.F.R. § 114.1
11 C.F.R. § 114.3
11 C.F.R. § 114.4

INTERNAL REPORTS CHECKED:

Disclosure Reports

FEDERAL AGENCIES CHECKED:

None

I. INTRODUCTION

This matter concerns allegations that the Ohio State Medical Association ("OSMA")
made, and U.S. Senator Sherrod Brown of Ohio and Josh Mandel, the Republican Party
candidate for Ohio's 2012 U.S. Senate seat, accepted, impermissible corporate in-kind

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1 contributions in violation of 2 U.S.C. § 441b(a) and (b) when OSMA posted to the public area of
2 its website links to a video recording of campaign related speeches that Brown and Mandel had
3 delivered to OSMA's restricted class at OSMA's Annual Meeting. Compl. ¶¶ 1, 3-4, 22, 28
4 (Apr. 9, 2012). The Complainant also alleges that by broadcasting campaign related speeches to
5 the public beyond its restricted class, OSMA violated the Federal Election Campaign Act of
6 1971, as amended (the "Act") and its implementing regulations. *Id.* ¶¶ 2, 23, 26-27.

7 In its Response, OSMA "admits that it inadvertently violated the Act through the actions
8 of its communications staff, who unwittingly posted on the public area of the OSMA website
9 links to a video of the two candidate[s'] speeches that contained some campaign content."
10 OSMA Resp. at 2 (Apr. 27, 2012). While OSMA does not identify a particular section of the Act
11 or an implementing regulation that it believes it violated, it appears that by making a recording of
12 Brown's and Mandel's campaign related speeches available to the public beyond OSMA's
13 restricted class, OSMA made a prohibited corporate contribution or expenditure in violation of
14 2 U.S.C. § 441b and 11 C.F.R. § 114.2(a)-(b).

15 While 2 U.S.C. § 441b(a) prohibits OSMA from making a contribution or expenditure in
16 connection with any federal election, in order for Brown and Mandel to violate 2 U.S.C.
17 § 441b(a) and (b), they must "knowingly . . . accept or receive any contribution prohibited by
18 [2 U.S.C. § 441b.]" Here, because OSMA only inadvertently posted to the public area of its
19 website a video recording of Brown's and Mandel's speeches, neither Brown nor Mandel could
20 have been aware that his speech would be made available to the public beyond OSMA's
21 restricted class. Accordingly, neither Brown nor Mandel knowingly accepted or received an
22 impermissible in-kind contribution from OSMA.

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1 Despite the apparent violation of the Act, we conclude that this matter does not warrant
2 further expenditure of Commission resources: (1) OSMA's public posting of links to a recording
3 of the candidates' speeches was apparently inadvertent; (2) the links were publicly accessible for
4 only ten days and OSMA removed them immediately upon notification that the links were
5 public; and (3) the video recording of the campaign related speeches was accessed only nineteen
6 times while publicly available. Accordingly, the Office of General Counsel ("OGC")
7 recommends that the Commission exercise its prosecutorial discretion and dismiss the
8 allegations that OSMA violated the Act. *See Heckler v. Cheney*, 470 U.S. 821, 831 (1985).
9 OGC further recommends that the Commission find no reason to believe that U.S. Senator
10 Sherrod Brown and Josh Mandel violated the Act because neither Brown nor Mandel was aware
11 that the candidates' speeches had been made publicly available. Given that OSMA has already
12 removed the public links and implemented remedial measures to prevent future public postings
13 of campaign related material, OGC does not recommend that the Commission send a cautionary
14 notification or admonishment letter to OSMA.

15 **II. FACTUAL SUMMARY**

16 OSMA is a 501(c)(6) tax-exempt "membership organization" under 11 C.F.R.
17 § 114.1(e)(1). OSMA Resp. at 1. OSMA holds an Annual Meeting, which only registered
18 members in good standing are permitted to attend. Joint Response of Josh Mandel, Citizens for
19 Josh Mandel, Inc., and Kathryn Kessler in her official capacity as treasurer ("Mandel Resp.") at
20 2 (May 11, 2012) (citing OSMA Bylaws at 10-11 (amended Mar. 2012), *available at*
21 [http://www.osma.org/files/documents/about-osma/governance/constitution-and-bylaws/](http://www.osma.org/files/documents/about-osma/governance/constitution-and-bylaws/20120325-constitution-and-bylaws-officialversion.pdf)
22 [20120325-constitution-and-bylaws-officialversion.pdf](http://www.osma.org/files/documents/about-osma/governance/constitution-and-bylaws/20120325-constitution-and-bylaws-officialversion.pdf)); *see also* Response of Friends of Sherrod

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1 Brown and Judith Zamore in her official capacity as treasurer ("Brown Resp.")¹ at 1, 2 n.1, 3
2 (June 5, 2012) (stating that Brown understood that attendance at the meeting was limited to
3 members of OSMA and not open to the general public).

4 At OSMA's invitation, Brown and Mandel each delivered a campaign related speech to
5 OSMA's restricted class at OSMA's Annual Meeting on March 24, 2012.² Compl. ¶¶ 10-12; *see*
6 Brown Resp. at 1; Mandel Resp. at 2. According to a local news account of OSMA's Annual
7 Meeting, in his speech, Mandel repeatedly referenced Brown by name, "criticized Brown for his
8 support of the health-care law" and "accused Brown of stalling medical-malpractice reforms
9 because of Brown's close ties to lawyers." Compl. at Ex. A. After Mandel delivered his speech,
10 Mandel's campaign staff "passed out materials and collected names, phone numbers and email
11 addresses." *Id.* In contrast, Brown delivered his speech a few minutes after Mandel's, but
12 "made no mention of Mandel[.] . . . He stuck mainly to policies and initiatives he has worked on
13 with doctors." *Id.*; OSMA Resp. at 2 n.1 ("Senator Brown's video does not once mention his
14 campaign and focused on national health care issues. However, given that he spoke following
15 Mr. Mandel's speech, the fact that the speeches occurred during an election season, and the
16 overall context, OSMA does not contest that both talks were campaign related."). Neither
17 Brown nor Mandel's Response addresses directly whether his speech at OSMA's Annual
18 Meeting was campaign related.

19 OSMA subsequently posted links to a video recording of Brown's and Mandel's speeches
20 at the Annual Meeting on the public area of its website, along with other non-political news from

¹ Sherrod Brown did not submit a Response in his individual capacity.

² OSMA's annual meeting took place eighteen days after Ohio's primary in which Mandel won the Republican nomination to challenge Brown in the 2012 election for U.S. Senate. Compl. ¶ 8.

1 OSMA's Annual Meeting. Compl. ¶ 19; OSMA Resp. at 2. The video recording included "the
2 entire 43-minute joint-presentation" of Brown's and Mandel's speeches, without any editing by
3 OSMA. Compl. ¶ 19. The video recording was hosted on an external site, <http://vimeo.com>.³
4 *See id.* at Ex. E; *see also* OSMA Resp. at 2 n.1, Ex. 2 ¶ 3 (Affidavit of Jason Koma, Director
5 Communications and Marketing for OSMA) ("Koma Aff."). The links to the videos were
6 available on the public area of OSMA's website through April 3, 2012, when OSMA removed
7 them after the Complainant brought the public links to OSMA's attention. OSMA Resp. at 2;
8 Koma Aff. ¶ 3. During the approximately ten day period when the links to the videos were
9 available on the public portion of OSMA's website, the videos were accessed nineteen times.
10 OSMA Resp. at 2; Koma Aff. ¶ 3; *see also* Compl. at Ex. E (indicating a total of eighteen plays
11 as of March 30, 2012).

12 The Complaint does not allege that OSMA violated the Act by inviting Brown and
13 Mandel to speak to its restricted class at its Annual Meeting; nor does the Complaint allege that
14 Brown and Mandel violated the Act by accepting OSMA's invitation and addressing OSMA's
15 restricted class. Indeed, the Complaint correctly acknowledges that the Commission's
16 regulations permit a membership organization to invite candidates to address its restricted class.
17 Compl. ¶ 15 (citing 11 C.F.R. § 114.3(c)(2)); *see also* 11 C.F.R. § 114.3(a)(2). Each Respondent
18 also made this point in its Response. OSMA Resp. at 1 ("FEC regulations permit a nonprofit
19 organization like OSMA to invite any candidate of its choice to make a campaign speech before
20 its restricted class at a conference.") (citing 11 C.F.R. § 114.3(c)(2)); Brown Resp. at 3 (OSMA

³ As indicated in Exhibit E to the Complaint, OSMA is a "Plus" member of Vimeo, and therefore presumably paid either a nominal monthly membership fee of \$9.95, or annual membership fee of \$59.95 to host all of the videos that OSMA posted to the web. *See* <http://vimeo.com/help/guidelines>; http://vimeo.com/help/faq/vimeo_plus#/help/faq/vimeo_plus; <https://secure.vimeo.com/plus> (last accessed Oct. 11, 2012).

1 "was squarely within its rights in inviting Senator Brown to speak and Senator Brown was
2 squarely within his rights in accepting that invitation with no resulting contribution.") (citing
3 11 C.F.R. §§ 114.3, 114.4); Mandel Resp. at 2 ("Mandel's speech at OMSA's annual meeting
4 was in full compliance with federal law").

5 The Complaint alleges instead that OSMA violated the Act and its implementing
6 regulations by posting to the public area of its website links to a video recording of speeches that
7 Brown and Mandel made to OSMA's restricted class, thereby broadcasting campaign related
8 speech "to an unrestricted audience that included the general public." Compl. ¶¶ 2, 11 n.3. The
9 Complaint contends that this broadcast amounts to OSMA's donation, and Brown's and
10 Mandel's knowing acceptance or receipt, of "something of value" in violation of section 441b(a)
11 of the Act. *Id.* ¶¶ 3-4, 26-28.

12 While Complainant's theory of liability on this allegation is unclear, both Brown and
13 Mandel in their Responses interpreted the Complaint to allege that the posted video was a
14 "coordinated communication," resulting in an in-kind contribution to the candidates under
15 11 C.F.R. § 109.21(b)(1). Brown Resp. at 2 n.3, 3 n.8; Mandel Resp. at 4. Both Brown and
16 Mandel assert that in order for OSMA's communication beyond its restricted class to qualify as
17 an in-kind contribution to a candidate, the communication must satisfy the three prongs of the
18 coordination test—payment, content, and conduct—outlined in 11 C.F.R. § 109.21. Brown
19 Resp. at 2 n.3, 3; Mandel Resp. at 4. Both Brown and Mandel deny that the public posting of
20 links to a recording of their speeches on OSMA's website constitutes a coordinated

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1 communication, and on that basis deny that they violated the Act.⁴ Brown Resp. at 3; Mandel
2 Resp. at 4.

3 OSMA denies that its posting of links to a video of the speeches contributed something of
4 value to the candidates, since the videos were accessed only nineteen times during the ten day
5 period that the links were publicly available. OSMA Resp. at 2, 3.

6 **III. ANALYSIS**

7 The Act and Commission regulations prohibit corporations and other organizations,
8 including membership organizations, from making contributions from their general treasury
9 funds in connection with any election of any candidate for federal office. 2 U.S.C. § 441b(a);
10 11 C.F.R. § 114.2(a). The Act also prohibits any candidate from knowingly accepting or
11 receiving any prohibited contribution. 2 U.S.C. § 441b(a); 11 C.F.R. § 114.2(d).

12 A "contribution" is "any gift, subscription, loan, advance, or deposit of money or
13 anything of value made by any person for the purpose of influencing any election for Federal
14 office." 2 U.S.C. § 431(8)(A)(i). An "expenditure" is "any purchase, payment, distribution,
15 loan, advance, deposit, or gift of money or anything of value, made by any person for the
16 purpose of influencing any election for Federal Office." 2 U.S.C. § 431(9)(A)(i). "Anything of
17 value" includes all in-kind contributions and, unless specifically exempted, the provision of
18 goods and services without charge or at a charge that is less than the usual and normal charge.
19 11 C.F.R. §§ 100.52(d)(1), 100.111(e)(1).

⁴ Brown's and Mandel's denials on this basis are valid because the recording of Brown's and Mandel's speeches posted via links from the public area of OSMA's website was neither an electioneering communication nor a public communication, and therefore fails the content prong of the coordinated communications test. 11 C.F.R. §§ 109.21(a), (c). Because we do not dispute Brown's and Mandel's denials that they knowingly accepted or received an impermissible in-kind contribution from OSMA, we decline to analyze further those denials under the coordinated communications test.

Commission regulations include several exceptions permitting corporate activity that would otherwise constitute an expenditure or in-kind contribution. *See* 11 C.F.R. § 114.1(a)(2)(x) (excluding from the definition of "contribution" and "expenditure" any corporate, union, or membership organization activity "specifically permitted by [11 C.F.R.] part 114"). For example, a membership organization may invite particular candidates to address members, executive and administrative personnel (or all employees), and their families at a meeting, convention, or other function without making a contribution to the candidate. 11 C.F.R. §§ 114.3(a)(2), (c)(2)(i).⁵ Furthermore, a membership organization may allow a candidate to address all of its employees, its members, and their families at a meeting, convention, or other function, without making a contribution to the candidate, provided it meets certain conditions. 11 C.F.R. § 114.4(e). Similarly, under certain circumstances, a membership organization may sponsor an election-related appearance by a candidate before the general public without making a contribution to the candidate. Advisory Op. 1996-11 at 5 (Nat'l Right to Life Conventions, Inc.).

Although Brown's and Mandel's speeches were campaign related, which no Respondent contests, the speeches themselves do not constitute a prohibited corporate contribution because they fall under the 11 C.F.R. § 114.3 exception for speeches delivered only to OSMA's restricted class. However, once OSMA made a video recording of those speeches available to the public beyond its restricted class, the exceptions to the definitions of "contribution" and "expenditure" provided by 11 C.F.R. § 114 no longer apply. Accordingly, the costs associated with OSMA

⁵ *See also* Corporate and Labor Organization Activity; Express Advocacy and Coordination with Candidates, 60 Fed. Reg. 64,260, 64,267 (Dec. 14, 1995) (explanation and justification) ("Prohibited contributions include in-kind contributions resulting from the coordination of election-related corporate . . . communications with candidates, except for certain activities described in [11 C.F.R. §§ 114.3 and 114.4], which may involve limited types of coordination with candidates.").

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1 making Brown's and Mandel's speeches available to a broader audience constitute something of
2 value to the candidates, an impermissible contribution or expenditure by OSMA in violation of
3 2 U.S.C. § 441b. 2 U.S.C. §§ 431(8)(A)(i), 431(9)(A)(i); *see also* Advisory Op. 1996-11 at 6
4 ("[T]he Commission cautions that an impermissible contribution would result if NRL were to
5 distribute the [candidates'] taped speeches [from NRL's convention] free of charge . . . to the
6 general public, since the taping and distribution of the candidates' views on the issues addressed
7 at the convention is something of value to the candidates.") (citing Advisory Op. 1980-90
8 (Atlantic Richfield Company) (taping and free distribution to television stations of candidates'
9 views on energy issues is a corporate contribution)).

10 Notwithstanding the potential violation by OSMA, under the circumstances presented
11 here, OGC recommends that the Commission exercise its prosecutorial discretion to dismiss the
12 allegations that OSMA violated the Act because: (1) the public links to the video recording of
13 Brown's and Mandel's speeches were available for merely ten days; (2) the video recording was
14 accessed only nineteen times; and (3) OSMA prevented further public access of the video
15 recorded speeches immediately upon learning of it.⁶ OSMA Resp. 2; Koma Aff. ¶ 3.

⁶ Because posting the links to a video recording of Brown's and Mandel's speeches on OSMA's public website constituted an expenditure or contribution to Brown and Mandel of "something of value," and it is possible that the amount OSMA spent to host the event at which it recorded Brown's and Mandel's speeches exceeded \$250, OSMA may have triggered a reporting obligation. *See* 2 U.S.C. § 434(c). Nonetheless, we recommend that the Commission exercise its prosecutorial discretion to dismiss this additional potential violation of the Act on this basis.

In addition, no disclaimer was required on the video because it is not a "public communication" under 11 C.F.R. § 100.26. *See* 2 U.S.C. § 441d(a); 11 C.F.R. § 110.11(a)(1), (2). The definition of "public communication" includes "general public political advertising" pursuant to 11 C.F.R. § 100.26. But all internet communications, except those posted for a fee on another's website, are excluded from "general public political advertising" and consequently are not "public communications." 11 C.F.R. § 100.26. Here, the public links to the video recording of Brown's and Mandel's speeches were posted on OSMA's own website for no fee, so the video is not general public political advertising, and therefore not a "public communication." *Id.* Although OSMA paid a minimal amount to join Vimeo as a monthly or annual member, the Commission has previously determined that payment of such a nominal fee does not disqualify the videos from exclusion from the definition of "public communication" that 11 C.F.R. § 100.26 grants to "communications over the Internet[.]" *See* Internet Communications, 71 Fed. Reg. 18,589 at 18,594-95, 18,603, 18,607 (Apr. 12, 2006) (explanation and justification)

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Moreover, because neither Brown nor Mandel was aware that his campaign related speech would be made available to the public beyond OSMA's restricted class, and the Complainant provides no evidence either from personal knowledge or otherwise to support his contention that Brown or Mandel knowingly accepted something of value, neither Brown nor Mandel can be found to have violated the Act by knowingly receiving or accepting an in-kind contribution. Therefore, OGC recommends that the Commission find no reason to believe that Brown and Mandel violated 2 U.S.C. § 441b(a), and that the Commission close the file in this matter.

IV. RECOMMENDATIONS

1. Dismiss the allegations that Ohio State Medical Association violated 2 U.S.C. § 441b(a) and (b) in an exercise of prosecutorial discretion as outlined in *Heckler v. Chaney*, 470 U.S. 821 (1985).
2. Find no reason to believe that U.S. Senator Sherrod Brown, Friends of Sherrod Brown and Judith Zamore in her official capacity as treasurer, violated 2 U.S.C. § 441b(a).
3. Find no reason to believe that Josh Mandel, Citizens for Josh Mandel, Inc. and Kathryn Kessler in her official capacity as treasurer, violated 2 U.S.C. § 441b(a).
4. Approve the attached Factual and Legal Analyses.
5. Approve the appropriate letters.

(exempting from definition of "contribution" a communication over the internet that requires payment of a "nominal fee" to a host site). Accordingly, OSMA did not violate the Act by failing to include a disclaimer on video that it posted on its website. See 2 U.S.C. § 441d(a); 11 C.F.R. § 100.11(a)(1), (2); *see also* Advisory Op. 2008-10 (WideOrbit, Inc. d/b/a VoterVoter.com) at 8 (stating that a disclaimer need not appear on an advertisement posted without a fee on a website).

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6. Close the file.

10/15/12
Date

Anthony Herman
General Counsel

BY:

[Signature]
Daniel A. Petalas
Associate General Counsel
for Enforcement

[Signature]
Emily M. Meyers
Attorney

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